IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 8, 2008 Session

JEFFREY SCOTT CLONCE v. KIMBERLY MICHELLE CLONCE

Appeal from the Circuit Court for Davidson County
No. 06D2590 Carol Soloman, Judge

No. M2007-02155-COA-R3-CV - Filed May 8, 2009

The trial court awarded a divorce to the husband, and named both parties as primary residential parents with equal parenting time of their two children. The court also ordered the husband to pay child support since his income was far greater than the wife's. However, because the wife had lost her job less than one month prior to the divorce hearing, the court was unsure of the most appropriate figure to use for the wife's income in calculating the presumptively correct amount of child support under the income shares guidelines. The court resolved the question by using the wife's most current income from part-time work, which resulted in a temporary level of child support of $1,250 per month. The court also declared that it would revisit the issue of child support after six months, and that its order could be modified "without the necessity of proving a change in circumstances or significant variance." The wife argues on appeal that the trial court's order was inconsistent with the statutes and regulations that govern child support. The only order under appeal is the order indicating the court's intent and setting temporary support at a level favorable to the wife. The court did not use its announced procedure in the order that is the subject of this appeal. Under the facts of this case, we affirm the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

PATRICIA J. COTTRELL, P.J.,M.S., delivered the opinion of the court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Pamela M. Spicer, Nashville, Tennessee, for the appellant, Kimberly Michelle Clonce.

Alan D. Johnson, Mary Arline Evans, Alfred Russell Willis, Nashville, Tennessee, for the appellee, Jeffrey Scott Clonce.

MEMORANDUM OPINION[1]

I. A CHILD SUPPORT CALCULATION

Jeffrey Clonce ("Husband") and Kimberly Clonce ("Wife") married in 1992. Two children were born of the marriage. On September 12, 2006, Husband filed a Complaint for Divorce, alleging as grounds adultery, inappropriate marital conduct and irreconcilable differences. Wife counter-claimed for divorce. Prior to trial, the parties agreed to a division of marital property. They also stipulated that Husband would be awarded the divorce on the ground of adultery, that no alimony would be paid, and that the parties would equally divide residential parenting time with their two children.

Only three issues remained unresolved at the time of the divorce hearing, which was conducted on August 13, 2007. The sole issue on appeal involves child support. The proof showed that Husband earns about $10,000 per month as a project manager for a company that builds hospitals. Wife worked on and off during the course of the marriage, but always earned less than Husband. Just three weeks prior to the hearing, Wife was laid off from her job as a bookkeeper with Skanska USA, a construction and engineering firm. That job paid $47,000 per year, or $3,953 per month, more than any previous job Wife had held. She subsequently found two part-time jobs, which together paid far less.

In a situation like the present one, where the parties share parenting time equally, the expected result of income inequality under the income shares guidelines would be that the parent who enjoys the greater income would pay child support to the other parent.[2] However, the sudden

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[1]Tenn. R. Ct. App. 10 states:

> This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

[2]The child support guidelines in effect before 2005 required the courts to calculate a presumptively correct amount of child support by multiplying the monthly income of the obligor parent by a flat percentage depending on the number of children whose support was at issue. The income of the obligee spouse was not considered at all in the calculation. The current guidelines, which went into effect in January of 2005, use the "income shares" method, which takes the income of both parents into account. *Kaplan v. Bugalla*, 188 S.W.3d 632, fn.8 (Tenn. 2006). *See* Tenn. Comp. R. & Regs., ch. 1240-2-4-.03. This method "presumes that both parents contribute to the financial support of the child in pro rata proportion to the actual income available to each parent." Tenn. Comp. R. & Regs., ch. 1240-2-4-.03(1)(a).

The income shares guidelines are applied through the use of a child support worksheet into which is entered the income of both parents and other information relevant to the needs of the children and the ability of the parents to pay, Tenn. Comp. R. & Regs., ch. 1240-2-4-.04, and through a schedule which sets out the pro rata share of each parent (continued...)

change in Wife's employment situation left the trial court uncertain as to the correct figure to enter into the child support worksheet for wife's income. The court heard testimony from both parties and then announced its conclusions from the bench. The court declared that it had found that Wife had an earning capacity of between $45,000 and $50,000 per year, but that in light of the uncertainty arising from the loss of her job with Skanska, it would award temporary child support based on the income from the two part-time jobs she held at that time. The result was a child support award to Wife of $1,250 per month, which was reduced to $991 per month to set off Husband's payment of Wife's pro rata share of private school tuition.

The court reasoned that Wife had not had sufficient time to find a better-paying job in the brief period between the loss of her position with Skanska and the divorce hearing, and it declared that in six months it would take a fresh look at Wife's job-hunting efforts and would modify the support obligation on the basis of its findings at that time, without the necessity of proof as to a significant variance in income. *See* Tenn. Code Ann. § 36-5-101(g) (allowing the court to decree an increase or a decrease of child support when it finds there to be a significant variance between the guidelines amount and the amount of support currently ordered).[3] The court's decision was memorialized in a "Final Decree of Divorce," filed on August 21, 2007.

Wife filed an appeal of the trial court's order in this court. Husband filed a motion to dismiss the appeal, arguing that the court's order was not ripe for appeal because it was not a final order under Tenn. R. App. P. Rule 3. This court denied the motion to dismiss.

Six months after the filing of the Final Decree of Divorce, Husband filed a motion in the trial court for a review of support. The trial court conducted a hearing on the motion, and filed a new child support order on March 24, 2008. Husband then filed with this court a motion to consider the trial court's 2008 order as a post-judgment fact pursuant to Tenn. R. App. P. 14. Wife did not object, and this court granted the motion.

From the March 24, 2008 order, we learn that Wife had continued working at lesser-paying jobs. The court's order stated that Wife was not a credible witness, that she was willfully and voluntarily underemployed "considering the reasons for the Mother's occupational choices and in assessing the reasonableness therewith in light of the Mother's obligation to support her children," and that the court would impute income to her. The trial court accordingly set child support based on Wife's reported 2007 income of $39,500, which resulted in a reduction of Husband's child support obligation to $518 a month after his payment of Wife's share of private school tuition for the parties' two children. *See* Tenn. Comp. R. & Regs., ch. 1240-2-4-.04(3)(a)(2)(i)(ii).

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[2](...continued)
for each level of income. Tenn. Comp. R. & Regs., ch. 1240-2-4-.09.

[3]A significant variance is defined as "at least 15% if the current support is one hundred dollars ($100.00) or greater per month and at least fifteen dollars ($15.00) if the current support is less than $100.00 per month." See Tenn. Comp. R. & Regs. ch. 1240-2-4-.02(3). *Kaplan v. Bugalla*, 188 S.W.3d at 636; *Demers v. Demers,* 149 S.W.3d 61, 68 n. 6 (Tenn. Ct. App. 2003).

II. ANALYSIS

It is important to note that this appeal is from the August 21, 2007, order. It is not an appeal from the March 24, 2008, order which set Wife's child support obligation by imputing income to her on the basis of a finding of underemployment. While we have been informed through appropriate procedures of the trial court's rulings in that later order, that is not the subject of this appeal. Neither the amount of support nor the procedures used in arriving at the March 24, 2008, order is properly considered in this appeal.

In her appeal of the August 2007 order, Wife does not challenge the amount of the support obligation. That is understandable since the trial court's actions in setting the original or temporary amount based on Wife's situation at the time of the hearing resulted in an order that favored Wife. The court recognized the recent decrease in Wife's earnings.

Wife makes two challenges to the August 2007 order. First, she argues that the trial court erred in imputing income to her of $45,000 - $50,000 and erred in the underlying finding that she was willfully underemployed. Second, she argues that it was error for the court to state that modification of the amount set in the August 2007 order would not require a showing of significant variance.

As to Wife's first issue, we have reviewed the August 2007 order and do not find that the trial court imputed income to Wife based on her prior salary.[4] Instead, the order specifically states, "Wife /Mother has an earning capacity of $45-50,000 per year but that for six (6) months, child support should be based upon her actual employment which is substantially less." The incorporated parenting plan reflects Wife's gross monthly income as $2,470. Thus, the trial court did not impute income of $45,000 - $50,000 to Wife for purposes of establishing child support in the August 2007 order.[5]

The issue of the trial court's statement in its August 2007 order that child support would be reviewed in six months and "may be modified without the necessity of proving a change in circumstances or significant variance" requires further discussion, however. As Wife asserts, the standard for determining a modification of child support is whether a significant variance exists between the current support and the amount due under application of the guidelines to current circumstances. Tenn. Code Ann. § 36-5-101(g)(1). Because the court did not actually modify Wife's child support in the August 2007 order, Wife's objection must be to the court stating its intentions, and not to any action actually taken in conformance with those intentions. We are not

[4] In fact, in her brief Wife notes that the trial court made a specific finding that she was not deliberately underemployed at the time of the 2007 hearing.

[5] We note that the record does not contain the transcript of the dispositive hearing from which the order of March 24, 2008 arose. Consequently, Wife's arguments regarding the factual basis for the court's purported finding of underemployment would be unavailing.

convinced that a statement of intent of a future course of action provides a basis for appellate relief where the appellant can allege no actual harm from the statement of intent.

Additionally, having thoroughly reviewed the August 2007 order, we must conclude that it was a temporary order with regard to child support because of the specific circumstances facing the parties at the time of the hearing. The temporary nature of the child support award is clear from the limit expressly set on its duration.[6] Until an order becomes final, it remains within the trial court's control, and may be modified at any time prior to the entry of a final judgment. *In re Estate of Henderson*, 121 S.W.3d 643, 645 (Tenn. 2003); *Stidham v. Fickle Heirs*, 643 S.W.2d 324, 328 (Tenn. 1982); *See Shofner v. Shofner*, 181 S.W.3d 703, 712 (Tenn. Ct. App. 2005) (trial court's order was not final because it did not resolve all the claims between the parties); *Eldridge v. Eldridge*, 137 S.W.3d 1, 20 fn. 10 (Tenn. Ct. App. 2002) (trial court could amend its child support order, which was not final because the order failed to grant the parties a divorce). Accordingly, the trial court herein would have retained the authority to modify its August 21, 2007, order without application of the significant variance test.

In any event, we fail to see how a statement by the trial court in its August 2007 order that it would apply the significant variance test would have made that order more favorable to Wife. Until the court actually modified the child support award, whether it was properly termed temporary or not, there was no harm to Wife, and therefore no relief needed. Finally, application of the significant variance test would not necessarily have resulted in a lower support obligation for Wife. In determining whether there was a 15% difference between Wife's current payments and the amount due under the guidelines, the court would be entitled to consider whether Wife was willfully underemployed and to impute income to her. The significant variance test does not include a requirement that there be some change of circumstances since the entry of the last support order, even though it is often such a change that results in the variance.

In some cases where the trial court has expressly recognized the possibility of a future change to its order this court has treated the order in place as final for purposes of appeal, *see Hoalcraft v. Smithson*, 19 S.W.3d at 827-28 (order of custody was final, even though trial court declared that it was placing the case on its review docket); *Dailey v. Dailey,* No. 03A01-9409-CH-00340, 1995 WL 11179 at *3 (Tenn. Ct. App. Jan. 12, 1995) (no Tenn. R. App. P. 11 perm. app. filed) (order modifying custody from mother to father was a final order, even though trial court labeled it as

[6]Thus, in retrospect, after becoming fully informed of the issues in this appeal, it would appear that this court should have granted Husband's motion to dismiss. Any party to a civil action aggrieved by the final order of the trial court may take an appeal as of right to the Court of Appeals by filing a notice of appeal within 30 days after the date of entry of the judgment appealed from. *See* Tenn. R. App. P. 3(a) and 4(a). However, an order which is not final is not appealable as of right, although it may be appealed by leave of the courts through a motion for interlocutory appeal under Tenn. R. App. P. 9, or the trial court may declare it final for purposes of appeal, "upon an express determination that there is no just reason for delay" under Tenn. R. Civ. P. 54.02. *Shofner v. Shofner*, 181 S.W.3d at 713; *Hoalcraft v. Smithson*, 19 S.W.3d 822, 827 (Tenn. Ct. App. 1999). Nonetheless, we believe at this point that the parties' interests and those of judicial economy would be better served by our treating Wife's notice of appeal as a request for extraordinary appeal pursuant to Tenn. R. App. P. 10 and granting that request.

temporary, and mother therefore had to demonstrate that there had been a material change of circumstances before custody could be returned to her). The facts of this case, however, differ in real and practical ways. Wife did not appeal the amount of support set in the August 2007 order, whereas in the cited cases, the appellant challenged the substance of the order. Herein, the trial court set a specific duration of the temporary support, rather than leaving it open-ended.

This court has expressed concern about trial courts leaving matters open for final resolution and thereby effectively depriving the parties of an appeal. We do not have that concern in this situation. Wife did not attempt to challenge the child support obligation established by the August 2007 order; instead, she wanted it to continue on a permanent basis. The trial court attempted to fashion a resolution that recognized the recent decrease in Wife's income and ability to provide support without jeopardizing the children's right to adequate support on a permanent basis. While we cannot encourage or condone orders that attempt to change the correct standard to be applied, we find no reversible error in the trial court's August 2007 order herein.

III.

We affirm the Final Decree of Divorce and remand this case to the Circuit Court of Davidson County for any further proceedings that might be necessary. The costs on appeal are taxed to the appellant, Kimberly Michelle Clonce.

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PATRICIA J. COTTRELL, P.J., M.S.